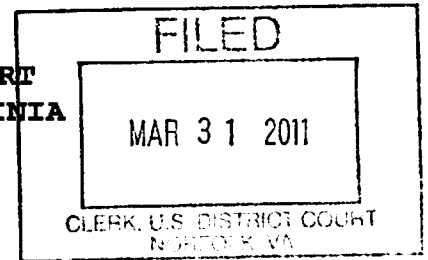


UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division



TOBY SCOTT HAWLEY, #1197735,

Petitioner,

v.

GENE M. JOHNSON, Director,  
Virginia Department of Corrections,

Respondent.

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

CIVIL ACTION NO. 2:10cv410

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to petitioner's January 25, 2005 convictions in the Circuit Court of Powhatan County for breaking and entering, robbery and use of a firearm in the commission of a felony. As a result of these convictions, Petitioner was sentenced to serve twenty-five (25) years in prison, with seventeen (17) years suspended, conditioned upon the Petitioner being of good behavior indefinitely. Such suspension left an active sentence of eight (8) years to be served.

The matter was referred to a United States Magistrate Judge for report and recommendation pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia.

The Report and Recommendation filed January 3, 2011 (ECF No. 14) recommends dismissal of the petition. Each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On January 13, 2011, the Court received Petitioner's General Objections to the Magistrate Judge's Report and Recommendation and Motion for Extension of Time to File Specific Objections to said Report and Recommendations (ECF No. 15). By Order entered January 21, 2011 (ECF No. 16) the Court granted Petitioner's request for extension of time to file additional written objections. On February 14, 2011, the Petitioner filed additional objections (ECF No. 17) and a second Motion for Evidentiary Hearing (ECF No. 18).<sup>1</sup>

The respondent filed no response to either set of Petitioner's objections and the time for responding has now expired.

The Court, having reviewed the record and examined the objections filed by petitioner to the Report and Recommendation, and having made de novo findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the Report and Recommendation filed

---

<sup>1</sup> On August 17, 2010, Petitioner filed his first Motion for Evidentiary Hearing (ECF No. 3) along with a Motion for Leave to Conduct Discovery (ECF No. 2), both of which were dismissed by Court Order entered March 18, 2011 (ECF No. 19).

January 3, 2011.<sup>2</sup> It is, therefore, ORDERED that the Respondent's Motion to Dismiss be GRANTED and the petition be DENIED and DISMISSED. It is further ORDERED that Petitioner's second Motion for Evidentiary Hearing (ECF No. 18) be DENIED and judgment be entered in favor of Respondent.


Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right," therefore, the Court declines to issue any certificate of appealability pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003).

---

<sup>2</sup> Hawley's objections did identify a factual error in the Magistrate Judge's Report and Recommendation, and such factual error is not adopted. The Report incorrectly recites that recantation affidavits attached to the petition pre-dated Hawley's direct appeal. As Hawley points out, the recantation affidavits were all reviewed by the Virginia Court of Appeals in its 2007 opinion on Hawley's petition for a writ of actual innocence (Hawley v. Commonwealth, No. 239-07-2 (Va. Ct. App., July 18, 2007)), not earlier as suggested in the Report. Nonetheless, the fact that the affidavits were prepared some months later than the Magistrate Judge recited does not affect the Report's conclusion that the affidavits are not "new evidence which would support Hawley's claims of actual innocence." (ECF No. 14 at p. 6). All three witnesses varied their testimony from the trial forward, and thus the timing of the particular affidavits - which are all dated three years prior to Hawley's federal habeas filing - clearly supports the Magistrate Judge's finding that they are not "new evidence."

Petitioner is hereby notified that he may appeal from the judgment entered pursuant to this Final Order by filing a written notice of appeal with the Clerk of this court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from the date of entry of such judgment.

The Clerk shall mail a copy of this Final Order to Petitioner and counsel of record for respondent.

/s/   
MARK S. DAVIS  
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

March 31, 2011